

This Opinion is Not a
Precedent of the TTAB

Mailed: July 12, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jesse Redniss

Serial No. 90622279

Erik M. Pelton of Erik M. Pelton & Associates PLLC
for Jesse Redniss.

Gabrielle Rennie, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

Before Wolfson, Heasley, and Larkin,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant Jesse Redniss appeals from the Trademark Examining Attorney's final refusal to register his mark QONSENT (in standard characters) on the Principal Register on the ground that the mark is merely descriptive of Applicant's identified services:

Software as a service (SAAS) services featuring software for use by website, mobile application, connected TV/smart TV and online digital publishers for **collecting and managing access to visitor data**; software as a service (SAAS) services featuring software for use by website, mobile application, connected TV/smart TV and online publishers **to enable compliance with data privacy regulations regarding visitor data**; software as a service (SAAS) services featuring **software that**

empowers visitors to determine and easily modify permissions and preferences regarding access to and use of the individual's data by third-party websites, mobile applications, connected TVs/smart TVs and online publishers; software as a service (SAAS) services, namely, software for **managing third-party access to user's data** by third-party websites, mobile applications, connected TV/smart TV and online publishers; software as a service (SAAS) services featuring software for **exercising control over online and enterprise data collection, privacy and use practices**; software as a service (SAAS) services featuring software for **compliance with industry obligations concerning data collection, privacy and use practices**; development of software for **managing consent to access private information and empowering users to grant or deny access to users' data** by third-party websites, mobile applications, connected TV/smart TV and online publishers; technical support and information technology services, namely, computer systems integration services and monitoring technological functions of computer software, all relating to software for managing access to user data, in International Class 42 (emphasis added).

For the reasons discussed below, we affirm the refusal to register.

I. Applicable Law

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration on the Principal Register of a mark that, when used in connection with the applicant's goods or services, is merely descriptive of them. 15 U.S.C. § 1052(e)(1).

“A mark is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 2021 USPQ2d 1069, at *12 (Fed. Cir. 2021) (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)) (internal punctuation omitted).

It is the Examining Attorney's burden to show that a term is merely descriptive of an applicant's goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). Once a prima facie case is established, the burden of rebuttal shifts to Applicant. *Id.* When the Board has doubt on the issue of descriptiveness, it resolves such doubt in favor of the applicant. *In re Berkeley Lights, Inc.*, 2022 USPQ2d 1000, at *21 (TTAB 2022).

II. Summary of Arguments

The Examining Attorney maintains that QONSENT is a slight misspelling of the descriptive word "CONSENT,"¹ which, she notes, merely describes a key purpose or function of Applicant's consent management services: to obtain consumers' consent to collect their private data on websites, to store that private data securely, and to manage third-party access to that private data in accordance with the consumers' consent.² A misspelling that is the phonetic equivalent of a merely descriptive word is also merely descriptive, she maintains, if purchasers would perceive the different spelling as the equivalent of the descriptive word.³ She concludes that QONSENT is merely descriptive of Applicant's consent management services.⁴

Applicant counters that QONSENT combines "QUALITY" with "CONSENT" to refer to the high quality of his company's services.⁵ The proposed mark could be

¹ Examining Attorney's brief, 8 TTABVUE 5.

² *Id.* at 5-6.

³ *Id.* at 6 (citation omitted).

⁴ *Id.* at 8.

⁵ Applicant's brief, 6 TTABVUE 10.

pronounced as “kwahn-sent,” with a soft “Q”, he argues.⁶ His proposed QONSENT mark “does not identify Applicant’s software services with **immediate** specificity,” he insists, as “the relevant consumers of Applicant’s services could give Applicant’s mark at least four different interpretations”:⁷

- (i) The consent being given by users to Applicant;
- (ii) The collection of users’ consent as to how their personal data should be handled by those collecting and storing it;
- (iii) The secure “consent repository” database where users’ consent preferences are stored and managed; and
- (iv) The “consent” given by Applicant to companies he permits to use the collected data.

In sum, Applicant concludes, “the evidence of record demonstrates that consumers could interpret Applicant’s mark as referring to ‘consent management,’ which is the industry’s term for referring to processes or policies dictating how consent repositories handle data stored and users’ requests relating to their data after it has been collected and stored.”⁸ “At most, Applicant’s mark can be said to be highly suggestive of functions of Applicant’s software...,”⁹ he argues. “Further, the evidence of record does not establish that Applicant’s competitors use the term QONSENT descriptively.”¹⁰ Applicant concludes that any doubt should be resolved in his favor.¹¹

⁶ *Id.*

⁷ *Id.* at 13 (emphasis in italics in original).

⁸ *Id.* at 13-14.

⁹ *Id.* at 15.

¹⁰ *Id.* at 16.

¹¹ *Id.* at 15-16.

III. Mere Descriptiveness Analysis

“We begin by noting that slight variations in spelling of marks from their traditional spelling does not change the meaning of the term if the underlying term is itself descriptive.” *In re Vanilla Gorilla, L.P.*, 80 USPQ2d 1637, 1639 (TTAB 2006). The U.S. Supreme Court, addressing a single-letter misspelling in a descriptiveness case, held that:

The word [“rubberoid”], therefore, is descriptive, not indicative of the origin or the ownership of the goods; and, being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled [as RUBEROID]. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning

Standard Paint Co. v. Trinidad Asphalt Co., 220 U.S. 446, 455 (1911).

As Judge Learned Hand once put it:

It is, however, generally held that mere misspelling is not enough. ... The difficulty is double; a reader who knew how to spell might be in doubt whether the mistake was deliberate; one who did not, would be unaware that it was a mistake at all. ... **It does seem to us, however, that the misspelling of a single letter is too little**, for, while to many it might be enough, over many it would pass unnoticed.

Oakland Chem. Co. v. Bookman, 22 F.2d 930, 931 (2d Cir. 1927) (DIOXOGEN was a recognized misspelling of “dioxygen”; emphasis added), *quoted in* 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:31 (5th ed., June 2023 update).

The policy underlying the general rule that misspelled descriptive words may be merely descriptive is set forth in the Restatement of Unfair Competition:

The misspelling or corruption of an otherwise descriptive word will not ordinarily alter the descriptive character of the designation. In many instances the contrivance will not overcome the ordinary meaning of the term, and prospective purchasers will thus continue to understand the designation in a purely descriptive sense. Indeed, in some instances the

alteration may go entirely unnoticed by a significant number of consumers. If the altered form is phonetically equivalent to the original word, its aural significance will also remain merely descriptive. Recognition of exclusive rights in variants and corruptions of descriptive words also imposes a risk of liability on subsequent users of the original words.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 14, cmt. a. (1995) (May 2023 update).

The Board and its primary reviewing Court have consistently adhered to this policy. *See, e.g., King-Kup Candies, Inc. v. King Candy Co.*, 288 F.2d 944, 129 USPQ 272, 273 (CCPA 1961) (“It is clear, therefore, that the syllable ‘Kup,’ which is the full equivalent of the word ‘cup,’ is descriptive.”); *Hi-Shear Corp. v. National Auto. Parts Ass’n*, 152 USPQ 341, 343 (TTAB 1966) (HI-TORQUE “is the phonetical equivalent of the words ‘HIGH TORQUE’”); *In re Organik Techs. Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997) (ORGANIK is the phonetic equivalent of “organic”); *In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (“In general, a mere misspelling of a word is not sufficient to change a merely descriptive term into an inherently distinctive trademark.”).

As noted, Applicant contends that QONSENT is not the phonetic equivalent of “CONSENT,” as it could be pronounced “kwahn-sent,” with a soft “Q”.¹² Applicant’s support for this contention is a single webpage that attempts to pronounce the surname “Qo” by separating the letters and pronouncing them separately (“Q-kwuh and O-ah, ō, uh, oo, ū”).¹³ The Examining Attorney, on the other hand, submitted

¹² *Id.*

¹³ Jan. 30, 2022 Response to Office Action at TSDR 10-12.

evidence showing that “qo” can be pronounced “kow” or “caw,”¹⁴ and Wikipedia evidence showing that the letter “Q” not followed by “U” is often pronounced like a hard “C” or “K,” as in Iraq, NASDAQ, or QATAR.¹⁵ So one reasonable pronunciation is as “CONSENT.”

Another reason consumers would likely pronounce QONSENT as “CONSENT” is the nature of Applicant’s services. We consider the context of how the term is used in connection with the services, and the possible significance the term would have to the average consumer of the services because of the manner of its use or intended use. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) *quoted in In re Zuma Array Ltd.*, 2022 USPQ2d 736, at *6 (TTAB 2022).

Applicant’s company provides what is known in the field as a “Consent Management Platform.” As one article puts it, “Consent management platforms enable organizations to inform their users on how their data is stored and used so that users can consent to or refuse the collection of their personal data.”¹⁶ Applicant’s recitation of services identifies, inter alia, software as a service “that empowers

¹⁴ [Yhti.net/how-do-you-pronounce/qo/English/](https://yhti.net/how-do-you-pronounce/qo/English/) 3/31/2022, “HowToPronounce pronunciation dictionary, HowToPronounce.com/qo 3/31/2022, March 31, 2022 Office Action at TSDR 30-31.

¹⁵ [En.Wikipedia.org/wiki/List_of_English_words_containing_Q_not_followed_by_U](https://en.wikipedia.org/wiki/List_of_English_words_containing_Q_not_followed_by_U) 3/31/2022, March 31, 2022 Office Action at TSDR 32-34. “The Board will consider evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call its accuracy into question.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1959 n.3 (TTAB 2016). Applicant had this opportunity in his request for reconsideration, but did not rebut the Wikipedia evidence.

¹⁶ “Consent Management Platforms” [SourceForge.net](https://sourceforge.net) 11/19/2021, Nov. 19, 2021 Office Action at TSDR 6-10. *See also* “What is a Consent Management Platform (CMP) and Do You Need One?” [LiveRamp.com](https://liveramp.com) 3/31/2022, “What is Consent Management Platform and Why You Need it” [DataPrivacyManager.net](https://dataprivacymanager.net) 3/31/2022, “What is a Consent Management Platform?” [CMSWire.com](https://cmswire.com) 3/31/2022, March 31, 2022 Office Action at TSDR 8-9, 13-17, 24-25.

visitors to determine and easily modify permissions and preferences regarding access to and use of the individual's data by third-party websites, mobile applications, connected TVs/smart TVs and online publishers....”

Applicant's company website advertises “[t]he consumer-first approach to **consent** enablement and engagement,”¹⁷ “Frictionless, real-time ability to grant qualified **consent** in context” and “A clear value exchange for their 1st-party **consent**.”¹⁸ Consumers consenting to Applicant's terms for personal data privacy protection are offered a “SMART QONTRACT powered by QONSENT,” a “next-practice in **consent** enablement and engagement”.¹⁹ According to Applicant's press release, “Qonsent Officially Launches as The First Data Privacy **Consent** Solution for Both Consumers and Brands.”²⁰ (Emphases added.) And articles about Applicant's company characterize it as a “data privacy and consent engagement platform provider” and “the first consent enablement and consumer trust platform....”²¹

We consider such use of QONSENT “in its commercial context to determine the public's perception” of the proposed mark. *Berkeley Lights*, 2022 USPQ2d 1000, at *12 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017)). As a part of that context, “proof of mere descriptiveness may originate from

¹⁷ Qonsent.com Nov. 1, 2022 Office Action denying request for reconsideration, TSDR 21-22.

¹⁸ Applicant's website, Qonsent.com 11/19/2021 (emphasis added), Nov. 19, 2021 Office Action at TSDR 18.

¹⁹ *Id.* at 16-18. The misspelling of “CONTRACT” as “QONTRACT” reinforces the misspelling of “CONSENT” as “QONSENT.”

²⁰ PRNewswire.com 11/19/2021, Nov. 19, 2021 Office Action at TSDR 21.

²¹ VentureBeat.com 3/31/2022, MarTechSeries.com 3/31/2022, March 31, 2022 Office Action at TSDR 26-29.

[an applicant's] own descriptive use of its proposed mark... in its materials," *Zuma Array*, 2022 USPQ2d 736, at *14 (quoting *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019)). "[T]he United States Patent and Trademark Office ("USPTO") commonly looks to an applicant's website when it is made of record for possible evidence of descriptive use of a proposed mark." *Berkeley Lights*, 2022 USPQ2d 1000, at *9. In fact, "an applicant's own website and marketing materials may be . . . the most damaging evidence in indicating how the relevant purchasing public perceives a term." *Id.* at *12 (omitting internal punctuation).

Here, Applicant's company's own use of the word QONSENT on its website and in its press release, echoed in press coverage, indicates that not only Applicant, but a significant portion of relevant consumers, will pronounce and understand the proposed mark as "CONSENT," describing its consent management platform services. Prospective consumers will understand the mark immediately to convey information about eliciting their "consent" to use their personal data. There is no indication that consumers would be aware that the "Q" stands for "quality," or that it would change their pronunciation of QONSENT.

If anything, the four meanings that Applicant attributes to his proposed mark corroborate its descriptiveness. Whether QONSENT refers to consumers' consent to use their personal data, to Applicant's collection of that data, to Applicant's secure storage of that data, or to Applicant's consent to third-party use of that data—all four stages of the process center on **consent**. "It is well settled that so long as any one of the meanings of a term is descriptive ..., the term may be considered to be merely

descriptive....” *In re Dolce Vita Footwear, Inc.*, 2021 USPQ2d 478, at *13-14 (TTAB 2021) (quoting *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018)). Here, all four meanings are merely descriptive.

The evidence of record shows that others in the field provide consent management services, too.²² Even if these third parties spell the term “consent” without a “Q,” the misspelled term remains merely descriptive. *See Vanilla Gorilla*, 80 USPQ2d at 1639 (“Even if there was no evidence that such [misspelled] terms as NU, QUIK, KWIK, KUP, or ORGANIK were used, it would not mean that they were not descriptive.”). Such “descriptive terms are in the public domain and should be free for use by all who can truthfully employ them to describe their goods.” *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543-44 (1920)).

Applicant concludes that any doubt should be resolved in his favor,²³ but that is just another way of saying that the Examining Attorney bears the burden of proof. Here, the Examining Attorney has satisfied that burden, and we have no doubt as to the mere descriptiveness of Applicant’s proposed mark.

IV. Conclusion

On consideration of all the evidence and arguments of record, we find that Applicant’s proposed mark, QONSENT, is merely descriptive of the function and

²² “Consent Management Platforms” SourceForge.net 11/19/2021, Nov. 19, 2021 Office Action at TSDR 6-10 (listing consent management platforms).

²³ *Id.* at 15-16.

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purpose of Applicant's identified services, within the meaning of Section 2(e)(1). 15
U.S.C. § 1052(e)(1).

Decision: The refusal to register Applicant's proposed mark is affirmed.